KENNETH MCGUIRE
v.
UNITED STATES POSTAL SERVICE

DOCKET NO.
CH075209136ADD

OPINION AND ORDER

On May 8, 1980, the Board's Chicago Regional Office dismissed appellant's appeal of a removal action taken against him by the United States Postal Service (agency). The dismissal was based on the cancellation of the removal and the agency's substitution in its place of a fourteen-day suspension.[1] Appellant then moved for attorney fees. This action was dismissed by the presiding official for failure to prosecute on September 26, 1980, but the Board reversed that action and remanded the case to the Regional Office. *McGuire v. United States Postal Service*, 5 MSPB 130 (1981). On remand, the presiding official denied appellant's motion, finding that appellant had presented no evidence that the award was warranted in the interest of justice, as required under 5 U.S.C. § 7701(g) (1) and the Board's decision in *Allen v. United States Postal Service*, 2 MSPB 582 (1980).[2]

Appellant filed a petition for review in which he contends, *inter alia*, that the presiding official misinterpreted the evidence of record. Appellant claims that he presented evidence showing that the agency had acted in bad faith and that the action was clearly without merit. The petition also includes a letter dated December 17, 1980, to the Secretary of the Board from his attorney, Allen E. Christy, Jr., setting forth reasons why he believes the award of attorney fees is in the interests of justice. Since this material and relevant document was inadvertently not sent to the presiding official for his consideration, the petition for review is GRANTED.

[1]Four days following the dismissal of the action by the presiding official, appellant's union withdrew its grievance filed in appellant's behalf.

[2]Because he found that the award was not in the "interests of justice," the presiding official did not determine whether appellant had shown that he was the "prevailing party" before the Board. He found that the record was uncertain as to whether appellant's avoidance of removal was causally related to his appeal to the Board or was solely the result of his independent exercise of his grievance rights. Since the Board agrees that an award of attorney fees would not be in the interests of justice, we need not determine whether appellant was the prevailing party, *i.e.*, that he obtained all or a significant part of the relief sought in petitioning for appeal, regardless of whether a decision has been issued. *Hatler v. Department of the Air Force*, 9 MSPB 61 (1982); *Hodnick v. Federal Mediation and Conciliation Service*, 2 MSPB 431 (1980).

The burden of establishing that an award is in the interests of justice is on the moving party. *Allen, supra.*

The record shows that appellant was removed from his position based on the following charges: 1) failure to report for duty as ordered from October 17 to November 5, 1979, and from November 20 to December 7, 1979; and 2) failure to properly store mail in the back of his truck as ordered.

In his December 17, 1980, letter appellant's attorney argues that the agency acted in contravention of the instructions of appellant's physician by ordering appellant back to work and then removing him when he obeyed his physician's instructions.

The Board has reviewed the appellate record and finds that the only medical evidence supporting appellant's contention is an unsigned doctor's statement dated October 15, 1979, which the physician opines that appellant should take three weeks off, and another statement dated November 5, 1979, which states appellant is

> [R]eturning to work. Continue to do knee exercises and get as much moving around as possible while on the job. Also instructed to continue isometric exercises and pursue muscle stretching exercises as needed.

Even if the Board would find that there was no basis for the charge of failing to report during the period from October 17–November 5, 1979, appellant has provided insufficient evidence to show that there was no merit in charging appellant with failing to report during the period from November 20–December 7, 1979. In addition, since appellant does not contest the legitimacy of the second charge, this Board cannot find that the action was taken in bad faith or without merit, or that the award is warranted in the interest of justice. *Allen, supra.* Therefore, appellant has failed to establish that he is entitled to an award of attorney fees.

Accordingly, the initial decision is AFFIRMED as MODIFIED by this Opinion and Order. This is the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *August 27, 1982*